Supreme Court, U. S.
FILED
JAN 4 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-964

IRANIAN SHIPPING LINES, S.A.,

Petitioner,

v.

ARYA SHIPPING LINES, S.A.,
GEORGE L. MANTA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EUGENE GRESSMAN
1828 L Street, N.W.
Washington, D.C. 20036
Counsel for Petitioner

January 4, 1978

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
FEDERAL RULE INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	11
1. The courts below have misconceived the nature of Rule 17(b)'s reference to the "capacity of a corporation to sue or be sued."	13
2. The courts below have ignored and thus misconceived the effect of the Rule 17(b) reference to the law of the forum governing the capacity of a fiduciary representative to sue or be sued	16
CONCLUSION	18
APPENDIX:	
Order of the United States Court of Appeals for the Second Circuit	1a
Memorandum Decision of the United States District Court for the Southern District of New York	3a

TABLE OF AUTHORITIES

Cases:

Alosio v. Iranian Shipping Lines, S.A.,
307 F. Supp. 1117 (S.D.N.Y., 1970) 5

In re Baldwin Trading Corp.,
8 N.Y.2d 144, 202 N.Y.S.2d 312 (1960) 17

In re Bonnie Classics, Inc.,
116 F. Supp. 646 (S.D.N.Y. 1953) 17

Chicago Title & Trust Co. v. Forty-One Thirty-Six
Wilcox Bldg. Corp., 302 U.S. 120 (1937) 15

Joseph Muller Corp. Zurich v. Societe Anonyme
De Gerance, 314 F. Supp. 439 (S.D.N.Y. 1970),
affirmed, 451 F.2d 727 (C.A. 2, 1971) 13, 14

Marine Trust Co. of Buffalo v. Tralles,
263 N.Y.S. 750, 147 Misc. 426 (1933) 17

Oklahoma Natural Gas Co. v. Oklahoma,
273 U.S. 257 (1927) 15

Sinnot v. Hanan, 214 N.Y. 454, 108 N.E. 858 (1915) . . . 17

Statutes, Rules and Regulations

28 U.S.C. 1254(1) 2

Rule 17(b), Federal Rules of Civil Procedure . . . . . *passim*

Iranian Commercial Code of 1932 . . . . . *passim*

Iranian Commercial Code of 1969 7

Miscellaneous:

New York Business Corporation Law § 703(b)
(McKinney 1963) 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

IRANIAN SHIPPING LINES, S.A.,

Petitioner,

v.

ARYA SHIPPING LINES, S.A.,
GEORGE L. MANTA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Iranian Shipping Lines, S.A., hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this proceeding on October 6, 1977.

OPINION BELOW

The Second Circuit rendered no opinion. On October 6, 1977, more than three weeks after the oral argument, the Second Circuit entered an order affirming the judgment of the United States District Court for the Southern District of New York on the basis of the Memorandum Decision of Judge Werker of the Southern District, as reported at 426 F. Supp. 687. The Second Circuit's judgment and order, not yet reported, are reprinted in the appendix hereto, p. 1a, *infra*.

The Memorandum Decision of Judge Werker of the Southern District, dated October 19, 1976, is reported at 426 F. Supp. 687. It is reprinted in the appendix hereto, p. 3a, *infra*.

JURISDICTION

At issue is a summary judgment order, entered on October 19, 1976, by Judge Werker of the Southern District, dismissing a cross-claim filed under the federal antitrust laws by the petitioner herein, Iranian Shipping Lines, S.A. On appeal by the petitioner and following full briefing and oral argument, the Second Circuit on October 6, 1977, affirmed the judgment dismissing the antitrust cross-claim. This petition for certiorari is filed within 90 days of the Second Circuit's October 6 action.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an Iranian corporation has "capacity . . . to sue and be sued" within the meaning of Rule 17(b), Fed. Rules Civil Proc., and thus to maintain an ongoing federal antitrust suit where (1) the corporation has been involuntarily dissolved by operation of Iranian law subsequent to the institution of the federal antitrust claim, (2) Iranian statutory law permits, without time limitation, such a dissolved corporation to sue and be sued in the process of carrying out liquidation proceedings, but (3) no liquidation proceedings have been instituted in Iran.

2. Whether, under Rule 17(b), Fed. Rules Civ. Proc., a federal court must apply the law of the forum in determining whether a former director, holding a special authorization from a foreign corporation that was subsequently dissolved by operation of foreign law, can continue to manage and maintain in a representative capacity, subsequent to the dissolution, a federal antitrust cross-claim filed on behalf of that corporation prior to said dissolution.

FEDERAL RULE INVOLVED

Rule 17(b), Federal Rules of Civil Procedure:

> (*b*) *Capacity to Sue or Be Sued.* The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association,

> which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States is governed by Title 28, U.S.C. §§ 754 and 959(a).

STATEMENT OF THE CASE

The dismissal of the federal antitrust cross-claim is the culmination of a complex and prolonged litigation, the relevant portions of which may be briefly and chronologically summarized as follows:

1. Iranian Shipping Lines, S.A. (ISL), was organized in 1961 as a joint stock company under the 1932 Commercial Code of Iran.

2. One Nick C. Spanos, as all parties were aware, had long held a 48 percent stock interest in ISL. He was also a co-managing director of ISL, having been reelected to the board of directors in 1965 for a stated term of four years. On March 28, 1964, Spanos received the following special authorization (as an individual, not as a director) by means of a resolution adopted by the ISL board of directors (App. 64):

> 2. That Mr. Nick C. Spanos is appointed legal attorney of the Board of Directors, will full power and authority to negociate [sic], pursue, commit, sign any act or a action required by the Company and on behalf of the Company and sign alone. Mr. Nick C. Spanos is also authorized to institute legal action against any persoan [sic] and/or party for the collection of all funds due, and owed to the Company.

That authorization, which had no termination date, has never been revoked. Indeed, in denying an earlier motion to dismiss the antitrust claim in 1972, Judge Brieant of the Southern District specifically found (App. 148) that this resolution of the board of directors "appears to be in order and so far as any factual evidence proffered on this motion is concerned, is still in force and effect."

3. In 1967 a creditor of ISL. one Rudolph V. Alosio, brought a creditors' suit in the Southern District against ISL. *Alosio v. Iranian Shipping Lines, S.A.*, S.D.N.Y. No. 67-Civ-9. An amended complaint was filed in 1968 naming various other defendants, and other creditors were allowed to intervene as party plaintiffs. On June 10, 1968, ISL effected a general appearance in this action by filing an answer to the amended complaint; the answer has bben prepared under the supervision and authority of Spanos.

4. Out of the welter of complaints, cross-complaints, affidavits and other pretrial documents, it became clear to ISL that the various respondents herein had driven ISL into insolvency by means of a wrongful conspiracy in violation of the federal antitrust laws. For a summary of the alleged illegal acts of the respondents, see Judge Frankel's memorandum opinion in the *Alosio* case, 307 F. Supp. 1117 (S.D.N.Y. 1970).[1] These alleged illegal acts were

---

[1] Judge Frankel's opinion, 307 F. Supp. at 1119, noted that the verified amended complaint in the *Alosio* proceeding, as well as the unrefuted affidavits, showed that the respondents had (1) used an inadequately financed corporate husk [ISL] to defraud those they dealt with, (2) opened illegal bank accounts to siphon money out of ISL to pay personal obligations, (3) diverted corporate revenues

then translated by ISL into a federal antitrust cross-complaint in 1972, alleging that (1) ISL had been eliminated from the competitive business of shipping goods by sea between the United States and the Persian Gulf, and (b) the respondent Arya Shipping Lines, S.A., and others associated with it had conspired to monopolize that business. Pursuant to his 1964 authorization, Spanos helped prepare this antitrust cross-complaint and signed it as one of the attorneys for ISL. At this time in 1972, ISL had no asset other than this antitrust cause of action; and there was no other director, manager, attorney or stockholder of ISL who was willing to represent ISL's interests, or who had even sought to represent or protect those interests.

5. In May of 1972, various respondents filed motions to dismiss the ISL antitrust cross-claim on the ground, *inter alia*, that the filing of the cross-claim was "not the authorized act of IRANIAN SHIPPING LINES . . . nor of any of its duly-authorized directors or stockholders" and that ISL did not have "the full standing to initiate such Cross-Claim." App. 11. After full briefing and oral argument, Judge Brieant denied these motions on September 29, 1972, finding that Spanos' authority, derived from his 1964 authorization by the ISL board of directors, was "still in force and effect." App. 147-148. In sum, he found that Spanos had full authority to file and maintain the antitrust cross-complaint on behalf of ISL.

---

to themselves, and (4) driven ISL into insolvency as a means of waging personal financial warfare. The respondents have made no meaningful efforts subsequently to refute the factual charges outlined in Judge Frankel's opinion, charges which formed the basis for ISL's antitrust counter-claim.

6. The period between 1972 and 1976 was consumed with various motions not here relevant and with futile efforts to secure answers to interrogatories addressed to the respondent Arya Shipping Lines, S.A.

7. On June 22, 1976, Arya Shipping Lines filed the initial motion for summary judgment, seeking dismissal of ISL's antitrust cross-complaint. In its motion, Arya asserted that ISL "has been dissolved involuntarily under applicable Iranian law [as of April 27, 1973], the law under which cross-claimant was purportedly organized, and, consequently, that it lacks the requisite capacity to maintain this litigation." App. 253. The other respondents later joined in this Arya motion. App. 299, 301. Attached to the Arya motion was an affidavit of one Musa Sabi, a purported expert on Iranian law; and annexed to the affidavit were complete purported translations of the Iranian Commercial Code of 1932 and the revised Iranian Commercial Code of 1969. In essence, the affidavit of Musa Sabi purported to show:

> (a) ISL, as a pre-existing joint stock company, was required under the 1969 Commercial Code to transform itself into one of several specified new forms of organization. That Code also provided for a four-year grace period for such conversions, and specified that any joint stock company not so converted within that period shall be considered dissolved and "subject to the dissolution proceedings laid down in the [1932 Commercial Code]." App. 259.
>
> (b) ISL had failed to change its corporate structure by the end of the four-year grace period, April 27, 1973, and thus was "considered as having been dissolved *as of . . . April 27, 1973, and is subject to the liquidation proceed-*

ings stipulated in the [1932 Commercial Code]." App. 259; emphasis added.

(c) It should be noted that there was no claim, as there cannot be, that the 1932 Code contained any time limitation on liquidation proceedings.

8. ISL did not contest any of the foregoing statements as to the requirements of Iranian law or as to the fact that ISL had been deemed dissolved as a matter of Iranian law. But it did vigorously protest and deny the legal conclusion that Musa Sabi had drawn in his affidavit that ISL, as a "non-entity" under Iranian law, lacked the capacity to prosecute or maintain this federal antitrust action.[2] ISL affirmatively asserted that, within the meaning of Rule 17(b), Fed. Rules Civ. Proc., it had "capacity" under the 1932 Commercial Code of Iran to maintain and pursue the pending antitrust claim. App. 298. In support of that assertion, ISL pointed to the provisions of the 1932 Code that conferred legal capacity on any corporation undergoing liquidation or dissolution to have actions brought and defended in its own name, and to have its affairs wound up after its dissolution, including the collection of monies due it.[3] And reference was made to Article 203

[2] The Musa Sabi affidavit also had asserted the legal conclusion that, "as a non-entity under the laws of Iran, ISL lacks any corporate capacity whatsoever, including the capacity to prosecute this or any other litigation." App. 260-261. But no provision of Iranian law, or any official interpretation thereof, was cited in support of that conclusion.

[3] Under Article 207 of the 1932 Code, part of the liquidation function is "to wind up the affairs of the company, to discharge its obligations, to collect its debts and to distribute the assets in the manner provided for by Articles 208, 209, 210, 211 and 212." App. 279. Article 209 gives liquidators "the right to bring or defend actions in the company's name, either in person or by attorney." App. 279. See footnote 5, page 18, *infra*.

of that Code, which authorizes directors to carry out liquidation proceedings, "unless the general partners appoint other persons for this purpose chosen either from among themselves or outside the company or partnership."[4] App. 278.

9. In response to these ISL claims, the respondents secured a second affidavit from Musa Sabi. This affidavit conceded that "the status of claims that may have accrued in favor of a dissolved joint stock company, such as ISL, are governed by the liquidation proceedings set forth in the 1932 Code." App. 306. But Musa Sabi then asserted that, while ISL was "subject to" such liquidation proceedings, the proceedings can be "commenced" only by strict adherence to all the procedures set forth in the 1932 Code, including the appointment of a properly authorized liquidator. Only the liquidator of a dissolved company was said to have power to wind up its affairs or bring actions in its name. App. 306, 308. But, said Musa Sabi, since ISL had not "commenced" liquidation proceedings either by stockholder resolution or by court proceedings in Iran – as required by Iranian law – Spanos could have no authority to prosecute this antitrust litigation in the name of ISL. App. 308. That ISL had never voluntarily "commenced" liquidation proceedings under the 1932 Code is of course not contested. Suffice it to say that the Musa Sabi affidavit is silent as to the need to "commence" such voluntary proceedings when a company is involuntarily forced into dissolution by operation of law and is thereby automatically subject to the dissolution procedures.

[4] Spanos had received his 1964 authorization from the ISL board of directors not in his capacity as a director himself but as an independent authorized agent, with specific power to bring suit to collect all funds due ISL.

10. Musa Sabi's second affidavit also asserted that Spanos' term as director of ISL had expired in 1969 and that there was no provision in Iranian law for a "holding over" beyond the expiration of a term of office. He further asserted the legal conclusion that Spanos' authority to institute legal actions on behalf of ISL, pursuant to the 1964 resolution, terminated either on May 31, 1969, when his term as director expired, or on April 27, 1973, when ISL was considered dissolved as a matter of law. In short, Musa Sabi concluded that "Spanos simply has no authority *under Iranian law* to prosecute this action." App. 308; emphasis added.

11. In dismissing the antitrust cross-claim for lack of authority by Spanos to maintain the claim on behalf of ISL, Judge Werker relied almost totally upon his own personal beliefs about Spanos' authorization and upon Musa Sabi's legal conclusions drawn from his arguable analysis of Iranian law. Thus Judge Werker rejected ISL's contention as to the purpose of the 1964 resolution simply because "it is difficult to believe . . . that the 1964 board resolution was intended to authorize Spanos to act as a liquidator." 426 F. Supp. at 689. And Judge Werker said that, in light of the affidavits of Musa Sabi, "I am unwilling to conclude, as I otherwise might from the statute alone, that the express power of directors to 'carry out' liquidation proceedings under Article 203 [of the 1932 Code] also authorizes them to bring actions in the company's name." *Ibid.*

12. In sum, then, Judge Werker agreed with Musa Sabi's legal conclusions respecting "capacity" and held that (1) ISL lacked "capacity" since it had been involuntarily dissolved as of April 27, 1973, and had never initiated voluntary dissolution proceedings under the 1932 Code,

and (2) Spanos had no "capacity" since his position as an ISL director, unlike the "ususal practice" in the United States and particularly in New York, did not "carry over" beyond the expiration of his term in 1969. While referring to the second sentence of Rule 17(b), dealing with the capacity of corporations to sue and be sued, Judge Werker made no mention whatever of the third sentence of Rule 17(b), dealing with the capacity of fiduciary representatives to sue or be sued. Such was the nature of the opinion that the Second Circuit adopted.

REASONS FOR GRANTING THE WRIT

The decision below raises disturbing and important problems in the interpretation and application of Rule 17(b) of the Federal Rules of Civil Procedure. Indeed, that decision is an ominous one for all corporations, foreign or domestic, that find themselves involuntarily dissolved by operation of the laws under which they were organized. Under the Second Circuit's ruling, unless such a dissolved corporation performs the useless and often impossible act of instituting voluntary dissolution proceedings in the state of incorporation, the corporation will be barred from using the federal courts or any federal statutes to sue on legitimate federal causes of action to collect its remaining assets.

Rule 17(b) was certainly never designed to achieve such an unfair result. And that unfairness is augmented in this instance by the fact that no public policy is served by denying foreign corporations access to the federal courts where such corporations, even though defunct, are seeking to implement the antitrust laws of the United States and to collect what is their just due thereunder.

In this antitrust context, it is unthinkable that the invocation and maintenance of an antitrust claim should be dependent solely on whether corporate liquidators have been appointed under the law of Iran to conduct liquidation matters in that foreign country. In fact, it does not appear from the Iranian Commercial Code of 1932, or any other Iranian law before the courts below, that Iran has any prohibition against a defunct Iranian entity suing to collect assets in the United States despite noncompliance with local Iranian liquidation requirements. What public policy of Iran is embarrassed or defeated if ISL is allowed to continue this antitrust claim? Why should Iran be annoyed if a defunct Iranian company is permitted to collect its one major asset, its antitrust money claim, for distribution to its creditors and stockholders? Why should a federal court act so as to destroy a substantial and last remaining asset of a defunct corporation, to the detriment of creditors and stockholders, instead of taking steps to appoint a conservator or representative to hold any assets that are collected from this antitrust cross-claim? Indeed, what purpose is served by the decision below other than unwarrantedly to insulate the respondents from what may be their proper liability to ISL under the antitrust laws? And why should their allegedly ill-gotten gains be preserved, on a technicality, after the federal courts and the attorneys have spent years in preparing this case for trial?

These fundamental questions, of course, serve mainly to underscore the importance of Rule 17(b) interpretative rulings by the courts below, and the need for this Court's consideration of those determinations. It should also be emphasized that this Court has never had occasion to consider these Rule 17(b) matters; and in the absence of a definitive ruling by this Court in this case, the action of the Second Circuit in approving the reported opinion of

Judge Werker can have widespread and damaging repercussions in other federal courts called upon to deal with such Rule 17(b) problems, particularly in the antitrust context.

1. The courts below have misconceived the nature of Rule 17(b)'s reference to the "capacity of a corporation to sue or be sued."

At the heart of this case is the second sentence of Rule 17(b), which reads: "The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized." Obviously, the law of Iran is determinative in this instance of ISL's "capacity" to sue or maintain an antitrust cause of action. But what is the nature of the "capacity" that Iranian law controls?

(1) Heretofore, it has been universally assumed that the Rule 17(b) reference to "capacity" means only a "general capacity" to sue under the law of the state of organization. As was said by Judge MacMahon in the leading case on this matter, *Joseph Muller Corp. Zurich v. Societe Anonyme De Gerance*, 314 F. Supp. 439, 441 (S.D.N.Y. 1970),

> "At first glance, Rule 17 would appear to allow the state or nation under whose laws a corporation is organized to grant the corporation the capacity to sue and immunize it from being sued anywhere except in the state or nation of incorporation. 'Capacity to sue or be sued,' however, as used in the Rule was, in order to obviate this problem of creating immunity, intended to mean the general capacity to sue or be sued . . . . Once it is determined that a corporation has the general capacity 'to sue or be sued,' the Rule is satisfied."

The Second Circuit, on the appeal in the *Muller* case, expressly agreed with Judge MacMahon's conclusion "that Rule 17(b) deals only with the general capacity of a corporation to sue or be sued," 451 F.2d 727, 728 (C.A. 2, 1971), and this Court denied certiorari, 406 U.S. 906 (1972).

But in this case the Second Circuit has applied the Rule 17(b) capacity requirement as though it meant "specific capacity" rather than "general capacity." The Iranian law, by common consensus, confers on defunct corporations the "general capacity" to sue and be sued in order to wind up their affairs. That should be enough to end the Rule 17(b) matter of "capacity." The Second Circuit, however, in effect read Rule 17(b) as requiring that a defunct corporation be shown to have specific capacity to sue and be sued after compliance with dissolution proceedings actually instituted in the state of organization. In other words, the whole focus of the judicial inquiry here was whether ISL had complied with the Iranian law that deals specifically with the procedure for instituting voluntary dissolution proceedings in Iran. Therein lies a totally new and confusing element in the Rule 17(b) equation of "capacity."

(2) The Rule 17(b) concept of "capacity" has been further thrown into confusion by narrowly looking only at the Iranian law respecting the procedure for instituting *voluntary* dissolution in that jurisdiction. The Second Circuit ignored the conceded fact that ISL had been dissolved by operation of Iranian law and that it had no occasion or need to seek its own dissolution by the voluntary procedures provided by Iranian law. The very involuntariness of ISL's dissolution further emphasizes the desirability of testing its Rule 17(b) "capacity" in general rather than specific terms. The Iranian Commecial Code of 1932 obviously does not contemplate involuntary procedures, and one can fairly extract therefrom only a recognition that a corporation involuntarily thrust into dissolution and made "subject to the liquidation proceedings" of the 1932 Code (App. 259, 263) must be deemed to have the requisite "capacity" by operation of Iranian law.

(3) The Second Circuit, by approving Judge Werker's analysis, has applied the second sentence of Rule 17(b) as though it meant that a dissolved corporation that has been involuntarily given "capacity" to pursue liquidation proceedings in the incorporating state cannot be deemed to have "capacity" to pursue a corporate asset in a federal court in another jurisdiction. There is nothing in the language or the purpose of Rule 17(b) that lends support to that conclusion. The decision below in that respect can breed only confusion and inequity.

The decisions of this Court in *Oklahoma Natural Gas Co. v. Oklahoma*, 273 U.S. 257, 260 (1927), and *Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120, 125 (1937), while not dealing with Rule 17(b), confirm the notion that a dissolved corporation can maintain a suit if it has a general statutory capacity to bring suit, even though that capacity may not have been invoked or used in the state of incorporation. The Court emphasized in both cases that, while dissolution may put an end to a corporation's existence and to its right to sue and be sued, there may be "some statutory authorization for the prolongation of its life, even for litigation purposes." 302 U.S. at 125. In the *Oklahoma* case, the Court found such a prolongation of litigation life – or the capacity to sue or be sued – in an Oklahoma statute that appeared to do just what the Iranian Commercial Code does with respect to dissolved corporation – i.e., a statute that allowed the

liquidators "to collect and pay debts" and "to maintain or defend actions in their own names by the style of the trustees of such corporation dissolved." 273 U.S. at 260. The very existence of that statute was said to indicate that the corporation "for litigating purposes is still in being and continues to be a party before this Court." *Ibid.*

There is an obvious need for this Court to render a definitive clarification of the impact of Rule 17(b) on the capacity of dissolved foreign corporation to institute and maintain suits in the federal courts to collect their remaining assets.

2. The courts below have ignored and thus misconceived the effect of the Rule 17(b) reference to the law of the forum governing the capacity of a fiduciary representative to sue or be sued.

In assessing the capacity of Spanos to continue ISL's antitrust claim, the courts below made no reference other than to the second sentence of Rule 17(b), as if the corporate capacity to sue somehow controlled Spanos' capacity to manage the suit on behalf of ISL – both before and after its involuntary dissolution. Not one reference was made to the third sentence of Rule 17(b). That sentence, when read in conjunction with the first sentence, plainly says that "The capacity of an individual . . . acting in a representative capacity, to sue or be sued . . . [i]n all other cases . . . shall be determined by the law of the state in which the district court is held . . ."

The lower courts made no effort, in other words, to assess Spanos' capacity by reference to what the third sentence of Rule 17(b) calls "the law of the state [New York] in which the district court is held." Judge Werker's opinion did cite New York Business Corporation Law § 703(b) (McKinney 1963), but immediately distinguished it as being different from what the court deemed to be the controlling law of Iran – which precisely illustrates the basic error in the court's analysis, for Rule 17(b)'s third sentence makes controlling the law of New York, not that of Iran.

Had New York law been addressed, the courts below would have had to conclude that Spanos' 1964 authorization remained fully effective, just as Judge Brieant held in 1972. Particularly is that so since the New York law provides that, upon dissolution, the legal title to all corporate property and assets and the right to pursue all remedies to collect such assets automatically vest in the last directors as trustees. See New York Business Corporation Law §703(b), cited by Judge Werker; *In re Bonnie Classics, Inc.*, 116 F. Supp. 646, 648 (S.D.N.Y. 1953); *In re Baldwin Trading Corp.*, 8 N.Y.2d 144, 147-148, 202 N.Y.S.2d 312, 313-314 (1960); *Sinnot v. Hanan*, 214 N.Y. 454, 108 N.E. 858 (1915); *Marine Trust Co. of Buffalo v. Tralles*, 263 N.Y.S. 750, 147 Misc. 426 (1933).

Since Spanos was one of the last directors and since no one else was seeking to pursue ISL's antitrust claim, New York law would have permitted and does permit Spanos to continue to manage the case. It does so by recognizing the continuing effectiveness of his 1964 authorization and by recognizing that Spanos had additional authority by virtue of his being one of the last directors of ISL' What is disturbing about the decision below is the total failure to recognize that the law of New York, the state in which the Southern District sits, is made controlling by the third sentence of Rule 17(b) as to the capacity of an individual acting in a representative capacity to sue or be sued in a fed-

eral court. On the issue of Spanos' capacity, it matters not what the Iranian Commercial Code may say or what Musa Sabi's interpretations of that Code may be.[5] It matters not whether, under Iranian law, Spanos' authorization evaporated upon the expiration of his term as director. What does matter is that a federal court has patently applied the wrong law.

Such a challenge to the plain words of the third sentence of Rule 17(b) should not go unreviewed and uncorrected. The demands of the fair administration of civil justice in the federal courts require a reminder from this Court that the law made controlling by the third sentence of Rule 17(b) shall be applied uniformly and without exception.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE GRESSMAN
1828 L Street, N.W.
Washington, D.C. 20036
Counsel for Petitioner

January 4, 1978

[5] The irrelevance of Musa Sabi's interpretation of the Iranian Code respecting the power of directors to bring actions in ISL's name was exacerbated by the District Court's reliance on that interpretation in preference to its own reading of "the statute alone." 426 F. Supp. at 689. Indeed, Article 213 of that Code, which places responsibility for liquidation on the directors, flatly contradicts Musa Sabi's interpretation. Supp. App. 458.

APPENDIX

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of October, one thousand nine hundred and seventy-seven.

Present:

HONORABLE LEONARD P. MOORE
HONORABLE WILFRED FEINBERG
HONORABLE WILLIAM H. MULLIGAN
Circuit Judges

- -x

RUDOLPH V. ALOSIO,
Plaintiff,
-against-
IRANIAN SHIPPING LINES, S.A., et al.,
Defendants.

- -x

ATLANTIC STEAMERS SUPPLY CO., INC. OF PENNSYLVANIA, ET AL.,
First Intervening Plaintiffs,
-against-
IRANIAN SHIPPING LINES, S.A., et al.,
Second Defendants.

77-7041

- -x

IRANIAN SHIPPING LINES, S.A.,
Cross-Claimant-Appellant,
-against-
PETER MORAITES, et al.,
Impleaded Defendants-Appellees.

- -x

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the Memorandum Decision of Judge Werker dated October 19, 1976, and reported at 426 F. Supp. 687.

/s/ Leonard P. Moore
LEONARD P. MOORE

/s/ Wilfred Feinberg
WILFRED FEINBERG

/s/ William H. Mulligan
WILLIAM H. MULLIGAN
Circuit Judges

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

– –x

RUDOLPH V. ALOSIO,

Plaintiff,

-against-

IRANIAN SHIPPING LINES, S.A., et al.,

Defendants.

– –x

ATLANTIC STEAMERS SUPPLY CO., INC. OF PENNSYLVANIA, et al.,

First Intervening Plaintiffs,

-against-

IRANIAN SHIPPING LINES, S.A., et al.,

Second Defendants.

– –x

IRANIAN SHIPPING LINES, S.A., a corporation,

Cross-Claimant,

-against-

PETER MORAITES, et al.,

Impleaded Defendants.

– –x

MEMORANDUM DECISION

72 Civ. 1392 (HFW)

HENRY F. WERKER, D.J.

This is a motion by defendant Arya Shipping Lines, S.A. pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment on the amended cross-claim brought against it by Iranian Shipping Lines, S.A. (hereinafter

("ISL"). The Manta defendants,[1] Robert R. Kreis and the firm of Levin, Kreis, Ruskin & Gyory have also moved for summary judgment on that cross-claim upon the papers submitted by Arya. Movants contend that ISL lacks the capacity to prosecute this suit.

The facts surrounding this motion are not complicated. On March 1, 1972, ISL filed a cross-claim against Arya and twenty-two other defendants. The cross-claim was brought by Nick C. Spanos who had been appointed as a Managing Director of ISL on May 31, 1965. ISL itself was incorporated on April 10, 1961 as a "joint stock company" under the Commercial Code of Iran of 1932 (hereinafter "1932 Code").

Amendments to the 1932 Code effective in 1969 provided that joint stock companies had to reorganize, either as "public" or "private" joint stock companies or as non-joint stock companies. Pursuant to a subsequent amendment, joint stock companies organized under the 1932 Code, such as ISL, were given until April 27, 1973 to convert to an approved form of organization. Those that did not were to be dissolved as of that date by operation of law. A certificate issued by the Registrar of Companies and Industrial Properties of the Iranian Ministry of Justice[2] states that ISL failed to make the required

---

[1] The Manta defendants are: George L. Manta, Helen Manta, Mark F. Manta (a/k/a Frank Manta), Leo J. Manta and Mark F. Manta as Co-Executors of the Estate of John L. Manta, J.L. Manta, Inc., Manta Vin-Cor Steel Corporation, Manta Investments, Inc., Christ Karafotias, Paul Demos, Seymour F. Simon, Demos, Karafotias & Chrones, a partnership, and Telis Demos d/b/a Demos Travel Bureau.

[2] The Registrar is required to maintain all records which must be filed under the 1932 Code and the 1969 Amendments.

change in its corporate structure and that it "is considered as having been dissolved . . . subject to the liquidation proceedings stipulated in the [1932 Code]." The foregoing facts are not disputed.

Arya and the other movants contend that ISL lacks the capacity to continue prosecution of this suit because of the involuntary dissolution. They note that:

> "Iranian law contains no savings statute whereby the automatic incidents of corporate death are suspended for a specified period of time." Arya Memorandum at 6.

ISL maintains, however, that Spanos was authorized by an ISL Board of Directors resolution dated March 28, 1964 to "institute legal action against any person and/or party for the collection of all funds due and owed to the company." ISL urges that this resolution and the 1932 Code empower Spanos to proceed with this suit as a corporate liquidator.

DISCUSSION

Under Rule 17(b), Fed.R.Civ.P., the capacity of a corporation to sue is determined by the law under which it was organized. In deciding questions of foreign law, the court may look to the testimony of expert witnesses as well as the underlying statutes. 9 Wright & Miller, Federal Practice and Procedure § 2444 (1971). Moreover, disagreements over the meaning of a foreign statute raise questions of law, not fact, and they do not preclude the granting of a motion for summary judgment. *Bassis v. Universal Line, S.A.*, 436 F.2d 64, 68 (2d Cir. 1970); *Fleischmann Distilling Corp. v. Distillers Co., Ltd.* 395 F. Supp. 221 (S.D.N.Y. 1975).

Article 284 of the 1969 amendments to the 1932 Code provides that the dissolution of a joint stock company which has not been transformed into an approved type of organization by the deadline date "shall be subject to the dissolution proceedings laid down in the [1932 Code]." Article 203 of the 1932 Code in turn, provides that:

> "In [the] case of . . . joint stock companies, the director or directors shall carry out the liquidation proceedings . . ."

Finally, article 209 of the 1932 Code declares that:

> "Liquidators have the right to bring or defend actions in the company's name, either in person or by attorney."

The 1932 Code fails to state, however, whether the authroity of directors to carry out liquidation proceedings under article 203 makes them liquidators within the meaning of article 209.

In support of the motion for summary judgment, Arya has submitted two sworn affidavits by Musa Sabi, an accomplished Iranian attorney who has translated eight volumes of Iranian law into English. He has served for more than twenty years as an Iranian legal counsel to the United States Embassy in Tehran and is a recognized authority on the law of Iran. ISL has not questioned his credentials.

Musa Sabi states that liquidation proceedings cannot be commenced by the Board of Directors or Managing Directors acting alone. He goes on to explain that there are only two ways to commence liquidation proceedings under the 1932 Code and the ISL Articles of Association: (1) by shareholder vote at a meeting called to wind up the company in accordance with article 74 of the 1932 Code or

(2) by an order of the Iranian Court of First Instance issued upon the application of an interested party under article 143(3) of the Iranian Civil Procedure Code. Neither alternative was pursued here. Indeed, the amended ISL cross-claim notes that:

> ". . . Forty-eight percent of the shares of ISL are opposed to any dissolution or end of its corporate existence. . . . Under ISL's Articles of Association, a resolution to dissolve or liquidate ISL cannot legitimately be carried if it is opposed by as many as forty-eight percent of the shares issued and outstanding."

In light of the affidavits of Musa Sabi, I am unwilling to conclude, as I otherwise might from the statute alone, that the express power of directors to "carry out" liquidation proceedings under Article 203 also authorizes them to bring actions in the company's name.

Moreover, it is difficult to believe, as ISL contends, that the 1964 board resolution was intended to authorize Spanos to act as a liquidator. It was passed almost four years before the need to reoganize ISL arose and almost eight years before the dissolution took effect.

Even if I were to assume *arguendo* that Spanos was properly authorized in 1964 to bring suit as a director, the authorization would have expired long before the cross-claim was filed. Article 46 of the 1932 Code sets the term of office of a director at "four years at most," although a company's Articles of Association may permit the reelection of directors. Article 13 of the ISL Articles states that board members shall serve for a period of four years and that they may be reelected. Neither the 1932 Code nor the ISL Articles provides for directors to

remain in office in the event that replacement directors are not elected for some reasons. This differs of course from the usual practice in the United States. *See, e.g.*, New York Business Corporation Law § 703(b) (McKinney 1963). Since Spanos and his co-directors were last elected to their positions at an "Extraordinary Meeting" of ISL shareholders held on May 31, 1965, their terms of office expired on May 31, 1969 and Spanos was not a corporate director at the time he brought the cross-claim against Arya and others.[3] Thus, he could not possibly have brought the cross-claim as part of his duty to carry out liquidation proceedings under article 203.

The court concludes that ISL has been dissolved under Iranian law and that Spanos cannot continue its cross-claim against Arya and the other defendants. *Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120, 124-25 (1937); *Oklahoma Natural*

---

[3] At an earlier stage of this action, the Midland Bank and Trust Company moved to dismiss an ISL cross-claim against it. The bank contended that Spanos alone could not sign a stipulation of substitution of counsel because the ISL Articles of Association required documents to be signed jointly by the two Managing Directors of the company. ISL contends that in deciding that motion Judge Brieant held that "Spanos had the authority to bring the cross claim in the name and on behalf of ISL." ISL Memorandum at 3. However, that motion was addressed to a different question of law and Judge Brieant denied it "without prejudice to renew on a showing of facts indicating absence of actual authority." With respect to the board resolution upon which ISL seeks to rely, Judge Brieant observed that it was in force "so far as any factual evidence proffered on this motion is concerned." Because Arya has adduced further facts for the court's consideration at this time, I have reached a conclusion which differs from that of Judge Brieant.

Gas Co. v. Oklahoma, 273 U.S. 257-259-60. The cross-claim is therefore dismissed.

SO ORDERED.

DATED: New York, New York
October 19, 1976

/s/ Henry F. Werker
U.S.D.J.